Case Comments

Recovery of Punitive Damages Against Municipalities: *Young v. City of Des Moines*

Despite the recent trend toward abrogation of the common-law immunity of municipal corporations,[1] it has generally been agreed that, absent contrary statutory expression, municipalities are protected from punitive damage awards in civil actions.[2] This rejection of punitive damages had predominated as the majority rule in the United States since the middle of the nineteenth century. In *Young v. City of Des Moines*,[3] however, the Supreme Court of Iowa rejected this majority rule, adopted in one of its own prior decisions,[4] and permitted an award of punitive damages against the city of Des Moines. Although the court gave considerable attention to the policy arguments concerning municipal liability for punitive damages, its holding was primarily based on its interpretation of the Iowa statute that abrogated the common-law immunity of municipalities.[5]

This Comment first surveys the origin of and justification for punitive damages and the general principles that govern their distribution. The *Young* rationale supporting punitive damages against municipalities is then contrasted with the majority view forbidding them. Finally, this Comment will demonstrate that the allowance of punitive damages against a municipality should not be a mere progression of the abrogation of common-law municipal immunity. There are sound policy reasons for maintaining this limited protection that municipalities enjoy.

I. PUNITIVE DAMAGES: BACKGROUND

A. *In General*

The theory of punitive damages developed in the common law.[6] Civil

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971).

2. City Council v. Gilmer & Taylor, 33 Ala. 116, 70 Am. Dec. 562 (1858); Smith v. District of Columbia, 336 A.2d 831 (D.C. App. 1975); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); City of Chicago v. Kelly, 69 Ill. 475 (1873); City of Chicago v. Langlass, 52 Ill. 256, 4 Am. Rep. 603 (1869); City of Gary v. Falcone, 348 N.E.2d 41 (Ind. Ct. App. 1976); M'Gary v. President of Lafayette, 12 Rob. 674, 43 Am. Dec. 239 (La. 1846); Foss v. Maine Turnpike Auth., 309 A.2d 339 (Me. 1973); Desforge v. City of West St. Paul, 231 Minn. 205, 42 N.W.2d 633 (1950); Town of Newton v. Wilson, 128 Miss. 726, 91 So. 419 (1922); Chappell v. City of Springfield, 423 S.W.2d 810 (Mo. 1968); Hunt v. City of Boonville, 65 Mo. 620, 27 Am. Rep. 299 (1877); Woodman v. Nottingham, 49 N.H. 387, 6 Am. Rep. 526 (1870); Rascoe v. Town of Farmington, 62 N.M. 51, 304 P.2d 575 (1956); Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952); Rannells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975); Nixon v. Oklahoma City, 555 P.2d 1283 (Okla. 1976); Clarke v. City of Greer, 231 S.C. 327, 98 S.E.2d 751 (1957); Moody v. City of Galveston, 524 S.W.2d 583 (Tex. Civ. App. 1975); Cole v. City of Houston, 442 S.W.2d 445 (Tex. Civ. App. 1969); Wilson v. City of Wheeling, 19 W. Va. 323, 42 Am. Rep. 780 (1882).

3. 262 N.W.2d 612 (Iowa 1978).

4. Bennett v. City of Marion, 102 Iowa 425, 71 N.W. 360 (1897).

5. 41 IOWA CODE ANN. § 613A.2 (West Supp. 1979). *See* note 75 *infra* for text of this section.

6. Scott v. Donald, 165 U.S. 58 (1897). There are, however, four states (Louisiana,

law jurisdictions have prohibited them under any circumstances.[7] Punitive damages, often called vindictive damages, smart money, or exemplary damages,[8] are awarded in civil actions to punish the defendant rather than to compensate the plaintiff.[9] They are, therefore, measured not by the plaintiff's loss, but by the heinousness of the offender's wrongdoing. In addition, the defendant's pecuniary resources may be admitted into evidence in order to determine the amount that will adequately punish him.[10] Although each jurisdiction has specific criteria, punitive damages are generally recoverable when the defendant's misconduct is aggravated, and the state of mind of the offender is malicious, wanton, willful, oppressive, or reckless.[11] There is not, however, an absolute right to a punitive damage award;[12] the factfinder determines within its own discretion whether they are appropriate.[13]

There can be no cause of action based upon punitive damages alone.[14] "If he [the plaintiff] has no cause of action independent of a supposed right

Massachusetts, Nebraska, and Washington) that do not recognize punitive damages as a type of recovery. Vincent v. Morgan's La. & T.R. & S.S. Co., 140 La. 1027, 74 So. 541 (1917); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Boyer v. Barr, 8 Neb. 68, 30 Am. Rep. 814 (1878); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891).

7. Cooperative de Seguros Multiples v. San Juan, 289 F. Supp. 858 (D.P.R. 1968); Fay v. Parker, 53 N.H. 342, 16 Am. Rep. 270 (1873).

8. Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1892); Day v. Woodworth, 54 U.S. (13 How.) 363 (1851); Ray v. City of Detroit, 67 Mich. App. 702, 242 N.W.2d 494 (1976); Fay v. Parker, 53 N.H. 342, 16 Am. Rep. 270 (1873); Pegram v. Stortz, 31 W. Va. 220, 6 S.E. 485 (1888). *See also* Belli, *Punitive Damages: An Historical Perspective*, TRIAL, Dec. 1977, at 40.

9. Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1892); Day v. Woodworth, 54 U.S. (13 How). 363 (1851); French v. Deane, 19 Colo. 504, 36 P. 609 (1894); Schmitt v. Kurrus, 234 Ill. 578, 85 N.E. 261 (1908); Katko v. Briney, 183 N.W.2d 657 (Iowa 1971); Roberts v. Mason, 10 Ohio St. 277 (1859); Norel v. Grochowski, 51 R.I. 376, 155 A. 357 (1931); Wilson v. Oldroyd, 1 Utah 2d 362, 267 P.2d 759 (1954). *But cf.* Lucas v. Michigan Cent. R., 98 Mich. 1, 56 N.W. 1039 (1893) (punitive damages are only recognized as *compensation* to a plaintiff); Doroszka v. Lavine, 111 Conn. 575, 150 A. 692 (1930) (punitive damages cannot exceed the expenses for cost of litigation, less taxable costs, and therefore are compensatory in nature).

10. Schmitt v. Kurrus, 234 Ill. 578, 85 N.E. 261 (1908); Phelan v. Beswick, 213 Ore. 612, 326 P.2d 1034 (1958), Norel v. Grochowski, 51 R.I. 376, 155 A. 357 (1931); Wilson v. Oldroyd, 1 Utah 2d 362, 267 P.2d 759 (1954); Goldsmith v. Joy, 61 Vt. 488, 17 A. 1010 (1889).

11. Compare the slight variations between the required state of mind in the following jurisdictions: Scott v. Donald, 165 U.S. 58, 86 (1897) (requires evil motive, actual malice, deliberate violence, or oppression); Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (defendant's conduct must be wanton, gross and outrageous, or malicious); Harrington v. Hadden, 69 Idaho 22, 24, 202 P.2d 236, 237 (1949); Katko v. Briney, 183 N.W.2d 657, 662 (Iowa 1971); Foss v. Maine Turnpike Auth., 309 A.2d 339, 345 (Me. 1973) (the conduct of the defendant must be deliberate, malicious, or grossly negligent); Smithhisler v. Dutter, 157 Ohio St. 454, 459, 105 N.E.2d 868, 871 (1952) (a defendant must act with malice, fraud, or insult).

12. Birmingham Elec. Co. v. Shephard, 215 Ala. 316, 110 So. 604 (1926); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Smith v. Hill, 12 Ill. 2d 588, 147 N.E.2d 321 (1958); City of Gary v. Falcone, 348 N.E.2d 41 (Ind. Ct. App. 1976); Katko v. Briney, 183 N.W.2d 657 (Iowa 1971); Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N.W. 554 (1910).

13. Birmingham Elec. Co. v. Shephard, 215 Ala. 316, 110 So. 604 (1926); Chapin v. Tampoorlos, 325 Ill. App. 219, 59 N.E.2d 334 (1945); Young v. City of Des Moines, 262 N.W.2d 612 (Iowa 1978); Hodges v. Hall, 172 N.C. 29, 89 S.E. 802 (1916); Roberts v. Mason, 10 Ohio St. 277 (1859); Wilson v. Oldroyd, 1 Utah 2d 362, 267 P.2d 759 (1954); Topolewski v. Plankinton Packing Co., 143 Wis. 52, 126 N.W. 554 (1910).

14. Ress v. Rediess, 130 Colo. 572, 278 P.2d 183 (1954); Shore v. Shore, 111 Kan. 101, 205 P. 1027 (1922); Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S.W. 878 (1902); Gilham v. Devereaux, 67 Mont. 75, 214 P. 606 (1923).

to recover exemplary damages, he has no cause of action at all."[15] Although many jurisdictions require that the amount of punitive damages be reasonably related to the amount of compensatory damages awarded,[16] this limitation is inconsistent with the theory that the amount of punitive damages is to be determined by the aggravation of the defendant's conduct, and can be viewed as an attempt to limit the amount of punitive damage awards. The rule, however, has not been strictly followed in those jurisdictions in which it is used,[17] and some jurisdictions do not use it at all.[18]

B. *Origin and Justification*

Punitive damages arose relatively late in the common law. It is difficult to isolate the precise date of their origin because courts often permitted damages, seemingly in excess of actual damages, without explaining their justification. As early as 1763, however, in *Wilkes v. Wood*,[19] the court made it clear that to punish the defendant for wrongful trespass and false arrest, it would allow an award of damages greater than those required to cover actual injury to the plaintiff:

> [A] jury have [*sic*] it in their power to give damages for *more* than the *injury* received. *Damages* are defigned [*sic*] not only as a *satisfaction* to the *injured* person, but likewise as a *punishment* to the *guilty*, to deter from any such proceeding for the future, and as a proof of the *detestation* of the *jury* to the *action* itself.[20]

Courts have typically chosen among four theories to justify awards of punitive damages: protection of the public peace, compensation, punishment, and deterrence. Under the first theory—protection of the public peace—plaintiffs have been permitted to vindicate their rights in court beyond compensation for actual injury as a method of deterring violent acts on the streets.[21] It is questionable, however, whether an interest to profit from the punishment of another should be encouraged by the law,[22] and the justification is rarely used today.

The second theory supporting the award of punitive damages arose from the failure of courts to adequately compensate plaintiffs for damages that were seemingly incapable of being measured or, by rule of law, were

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15. Hoagland v. Forest Park Highlands Amusement Co., 170 Mo. 335, 344, 70 S.W. 878, 880 (1902).

16. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1180 (1931); Comment, *Municipal Tort Liability for Punitive Damages*, 1975-1976 TOL. L. REV. 624, 639.

17. Morris, *supra* note 16, at 1182 n.11.

18. Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973).

19. 98 Eng. Rep. 489 (C.P. 1763).

20. *Id.* at 498-99 (emphasis in original).

21. Winkler v. Hartford Accident and Indem. Co., 66 N.J. Super. 22, 168 A.2d 418 (1961); Merest v. Harvey, 128 Eng. Rep. 761, 761 (C.P. 1814) ("It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages").

22. Pegram v. Stortz, 31 W. Va. 220, 6 S.E. 485 (1888); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV 517, 522 (1957); Note, *The Assessment of Punitive Damages Against An Entrepreneur for Malicious Torts of His Employees*, 70 YALE L. J. 1296, 1298 (1961).

not compensated at all.[23] Therefore, punitive damages were awarded to compensate plaintiffs for mental anguish,[24] wounded dignity,[25] or attorney's fees.[26] Today, however, because of the increasing acceptance of intangible injuries as worthy of compensation,[27] this justification for punitive damages has been frequently criticized[28] and is rarely used. Connecticut[29] limits punitive damages to the amount of attorney's fees, so that they are in reality a type of compensatory damages, while in Michigan,[30] the term "punitive damages" is used solely to describe a type of compensatory damages. One authority has suggested that if a jurisdiction uses the term "punitive damages" to describe what is actually a compensatory measurement, the name should be changed to "compensatory damages" to avoid undue confusion.[31]

Today, punitive damages are most frequently justified by the third and fourth theories—punishment of the offender and deterrence to him and others from similar wrongdoings.[32] Therefore, their award is only permitted when the wrongdoer acted with ill-will, recklessness, spite, or malice rising to a level generally punishable by criminal law.[33] Only then is a defendant deserving of such punishment in civil proceedings.

C. *Criticism*

Even though in most states punitive damages are permitted in some form,[34] they are not favored in the law, and have been frequently criticized. Many critics contend that, because the law of torts is based upon compensation and the criminal law deals with punishing offenders, punitive damages are an unjust windfall to the civil plaintiff.[35] As the court in *Fay v. Parker*[36] emotionally stated:

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23. Day v. Woodworth, 54 U.S. (13 How.) 363 (1851); Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, in DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 4 (1969); Belli, *supra* note 8, at 42.

24. Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351 (1885); Belli, *supra* note 8, at 42; Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870 (1976).

25. Stuart v. Western Union Tel. Co., 66 Tex. 580, 18 S.W. 351 (1885); Tullidge v. Wade, 3 Wilson K.B. 18, 95 Eng. Rep. 909 (1769); Long, *supra* note 24, at 873.

26. Belli, *supra* note 8, at 42.

27. Kennon v. Gilmer, 131 U.S. 22 (1889); Duffy, *supra* note 23; Belli, *supra* note 8, at 42.

28. Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Fay v. Parker, 53 N.H. 342, 16 Am. Rep. 270 (1873); Bass v. Chicago & Nw. Ry., 42 Wis. 654 (1877); Duffy, *supra* note 23, at 5.

29. Doroszka v. Lavine, 111 Conn. 575, 150 A. 692 (1930).

30. Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922). *See* Ray v. City of Detroit, 67 Mich. App. 702, 242 N.W.2d 494 (1976), for a discussion of the punitive damages theory in Michigan, and how it is applied in suits against municipalities.

31. Duffy, *supra* note 23, at 7.

32. W. MCCORMICK, THE LAW OF DAMAGES § 77 (1935); RESTATEMENT (SECOND) OF TORTS § 908, Comment a (1979); Note, 70 HARV. L. REV., *supra* note 22, at 520; Belli, *supra* note 8, at 40.

33. *See* cases cited in note 11 *supra*.

34. For states not recognizing punitive damages, see note 6 *supra*.

35. Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Western Union Tel. Co. v. Guard, 283 Ky. 187, 139 S.W.2d 722 (1940); Bass v. Chicago & Nw. Ry. Co., 42 Wis. 654 (1877); Duffy, *supra* note 23, at 7; Belli, *supra* note 8, at 40.

36. 53 N.H. 342, 16 Am. Rep. 270 (1873).

> What is a civil remedy but *reparation* for a wrong inflicted, to the injury of the party seeking redress,—compensation for damage sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.[37]

It is argued that, in criminal law, an experienced judge determines the amount of the fine, but in civil proceedings, juries, who can easily be overwhelmed by the defendant's outrageous conduct, must decide what amount will adequately punish the defendant. Awards by juries are frequently higher than a criminal fine would have been had the defendant been prosecuted.[38]

This criticism is especially pronounced in the areas of product liability and mass disaster cases, in which a defendant could be liable to many plaintiffs for the same wrongdoing. Not only is the award of punitive damages unfair to the defendant in these circumstances—for he is punished multiple times for the same act—but it is also unfair to subsequent plaintiffs, whose compensatory damage awards may be uncollectable due to prior depletion of the defendant's financial resources by punitive awards.[39]

Although it has never been successfully argued in the United States Supreme Court, a few commentators and lower courts contend that punitive damages are unconstitutional. Since these damages most frequently serve the purpose of punishment and deterrence, they are in effect quasi-criminal.[40] Often when an offender is liable for punitive damages, he is potentially liable for criminal prosecution as well[41] and most jurisdictions permit a punitive damage award in addition to a criminal penalty.[42] Thus, it is argued that punitive damages constitute a criminal penalty without such constitutional protections as double jeopardy, self-incrimination, burden of proof beyond a reasonable doubt, and unanimity of jurors,[43] and therefore they violate the fifth and sixth

37. *Id.* at 382, 16 Am. Rep. at 319-20 (emphasis in original).

38. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.); Ford, *The Constitutionality of Punitive Damages*, in DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 15, 18 (1969); Note, 70 HARV. L. REV., *supra* note 22, at 530.

39. Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-39 (2d Cir. 1967) (Friendly, J.).

40. Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966); Duffy, *supra* note 23, at 10. *See generally* Ford, *supra* note 38.

41. Ford, *supra* note 38, at 15-16.

42. Morris v. MacNab, 25 N.J. 271, 135 A.2d 657 (1957); Smithhisler v. Dutter, 157 Ohio St. 454, 105 N.E.2d 868 (1952); Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (1945). *Contra*, Schafer v. Smith, 63 Ind. 226 (1878) (punitive damages not permitted if a defendant is potentially liable in criminal law for the same offense.)

43. Murphy v. Hobbs, 7 Colo. 541, 5 P. 119 (1884); Boyer v. Barr, 8 Neb. 68, 30 Am. Rep. 814 (1878); Fay v. Parker, 53 N.H. 342, 16 Am. Rep. 270 (1873); Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 P. 1072 (1891); Jones v. Fisher, 42 Wis. 2d 209, 166 N.W.2d 175 (1969); Duffy, *supra* note 23; Ford, *supra* note 38, at 15.

amendments of the United States Constitution. As one commentator remarked:

> Punitive damages are assessed against a defendant in order to accomplish the traditional criminal law objectives of punishment and deterrence. The substantive effects of many punitive damages awards are as oppressive as criminal punishment. The only discernable difference between a sizable award of punitive damages and a short jail sentence or criminal fine is the descriptive label employed. But resort to facile labeling is not a responsible judicial method of insuring fairness and due process of law in judicial proceedings. When such superficial distinctions are made, substantial pecuniary interests and property interests cannot find adequate constitutional protection from abuse and unwarranted interference.[44]

It is also tenable that the use of the defendant's wealth as a criterion for computing damages violates the equal protection clause of the fifth and fourteenth amendments; the wealthier one is, the more he must pay for the same conduct.[45]

In support of punitive damages, it is argued that they benefit society by punishing those who should be punished by the criminal law, but whose conduct is overlooked by the prosecutors.[46] Perhaps, instead, our criminal justice system needs to be overhauled to prevent this blurring of the purposes of civil and criminal law. Punitive damages are viewed by supporters as a private remedy rather than as a criminal one,[47] and therefore constitutional arguments lose their validity. Moreover, one authority contends that the purpose of tort law is to punish the defendant, as well as to compensate the plaintiff, and punitive damages aid in reaching the punishment goal.[48]

The double jeopardy criticism is weakened in Indiana where, if it is possible that a defendant will be prosecuted for the same offense, an award of punitive damages is withheld.[49] In several other jurisdictions, evidence of a prior criminal conviction may be used in mitigation of the punitive damage award.[50] This does not, however, console the defendant who is prosecuted *after* being held liable for punitive damages in a civil suit.

The principles and policies concerning municipal liability for punitive damages must be considered in light of this criticism of punitive damages in general.

D. *Punitive Damage Awards Against Municipalities*

In the absence of a statute permitting the award of punitive damages

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44. Ford, *supra* note 38, at 19.

45. *See id.*

46. McCORMICK, *supra* note 32, at 276.

47. Morris v. MacNab, 25 N.J. 271, 135 A.2d 657 (1957); Soucy v. Greyhound Corp., 27 App. Div. 2d 112, 276 N.Y.S.2d 173 (1967); Pratt v. Duck, 28 Tenn. App. 502, 191 S.W.2d 562 (1945).

48. Morris, *supra* note 16, at 1177.

49. Schafer v. Smith, 63 Ind. 226 (1878).

50. Albrecht v. Walker, 73 Ill. 69 (1874); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911); Wirsing v. Smith, 222 Pa. 8, 70 A. 906 (1908).

against a municipal corporation, the overwhelming majority of states refuse to award these damages.[51] This doctrine restricting punitive damages has also been applied against non-municipality defendants who are so related to the municipality that they merit the same protection.[52]

When the issue of punitive damages against a municipality arises, the indication is that either the jurisdiction has joined the majority of states and abrogated or modified municipal common-law immunity in tort,[53] or that the case arises under a proprietary function of the municipality's operation and thus no common-law immunity exists.[54] It is generally agreed, however, that the municipality retains an absolute immunity for acts or omissions of their employees that are discretionary or at a planning or policy level,[55] and therefore the issue of punitive damages would not arise.

Perhaps the first case in the United States to discuss the issue of awarding punitive damages against a municipality was *Whipple v. Walpole*,[56] an 1839 case that alleged gross negligence in the city's failure to repair a bridge. The New Hampshire Supreme Court permitted an award of punitive damages against the municipality in order to deter the city from such negligence in the future. *Woodman v. Nottingham*,[57] however, expressly overruled *Whipple* and held that punitive damages were never

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51. *See* cases cited in note 2 *supra*.

52. Urban Renewal Agency v. Tackett, 255 So. 2d 904 (Miss. 1971).

53. Some courts have judicially abrogated the common-law immunity of municipalities in tort cases: Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968 (1971); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968; Brinkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961), *as interpreted in* Sherbutte v. Marine City, 374 Mich. 48, 130 N.W.2d 920 (1964); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Willis v. Department of Conservation and Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970); Ayala v. Philadelphia Bd. of Public Educ., 453 Pa. 584, 305 A.2d 877 (1973); Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970); Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Long v. City of Weirton, 214 S.E.2d 832 (W. Va. 1975), while other states have statutorily abrogated in whole, or in part, the common-law immunity: Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780 (Iowa 1971); Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); Fanning v. City of Laramie, 402 P.2d 460 (Wyo. 1965).

54. Harris v. District of Columbia, 256 U.S. 650 (1921); McSheridan v. City of Talladega, 243 Ala. 162, 8 So. 2d 831 (1942); Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760 (1906); Updike v. City of Omaha, 87 Neb. 228, 127 N.W. 229 (1910); Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952); Bailey v. Mayor of New York, 3 Hill 531 (N.Y. 1842); Nanna v. Village of McArthur, 44 Ohio App. 2d 22, 335 N.E.2d 712 (1974). *But see* Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911) (holding that in South Carolina there is no distinction made between proprietary and governmental functions of a municipality, instead, there is no common law liability at all against municipal corporations).

55. Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Creelman v. Svenning, 67 Wash. 2d 882, 410 P.2d 606 (1966).

56. 10 N.H. 130 (1839).

57. 49 N.H. 387, 6 Am. Rep. 526 (1870).

permitted against a municipality because the required malice was too difficult to prove.[58]

Although there was some authority, even before *Young v. City of Des Moines*, expressly permitting punitive damage awards against municipalities, the majority viewpoint denying such relief has remained strong. Several courts, however, while rejecting an award of punitive damages against a municipality in the case before them, have hinted that they might approve such an award under more stringent conditions.[59] Those conditions, however, are so strict that no subsequent case in the respective jurisdictions has permitted an award of punitive damages against a municipality. An increasing number of states, on the other hand, are adopting or restating the majority viewpoint that denies punitive damages against a municipality. Two recent cases went so far as to overrule past cases in adopting the majority position. In *Nixon v. Oklahoma*,[60] the court held that punitive damages were never to be permitted against a municipality and disapproved two prior cases that had implied that these damages may sometimes be appropriate. A nuisance case in Missouri[61] that had actually permitted punitive damages against a city was subsequently overruled by one of the strongest opinions written espousing the majority rule.[62]

II. YOUNG V. CITY OF DES MOINES

A. *Facts and Holding*

Despite this overwhelming support for the majority rule, the Supreme Court of Iowa in *Young* permitted an award of punitive damages against the city of Des Moines.[63] The plaintiff alleged that his warrantless arrest for intoxication was illegal because he was not intoxicated at the time of the arrest.[64] The city failed to offer proof whether the plaintiff actually was intoxicated,[65] and the legal question was therefore whether a misdemeanor must in fact have been committed before a warrantless arrest is legal.[66] The

58. *Id.* at 394, 6 Am. Rep. at 532.

59. Smith v. District of Columbia, 336 A.2d 831, 832 (D.C. 1975) ("absent extraordinary circumstances not present here"); City of Chicago v. Kelly, 69 Ill. 475, 477 (1873) (punitive damages are only permitted when the injury was willful, which is "scarcely possible" against municipal corporations); City of Parsons v. Lindsay, 26 Kan. 426 (1881) (negligence must be so gross as to amount to wantonness); City of Covington v. Faulhaber, 177 Ky. 623, 197 S.W. 1065 (1917) (required more malice than for an ordinary defendant); Willet v. Village of Saint Albans, 69 Vt. 330, 38 A. 72 (1897) (award proper only if the municipal corporation authorizes or ratifies the wrongful conduct through the trustees of the corporation).

60. 555 P.2d 1283 (Okla. 1976).

61. Kelly v. City of Cape Girardeau, 338 Mo. 103, 89 S.W.2d 41 (1935).

62. Chappell v. City of Springfield, 423 S.W.2d 810 (Mo. 1968).

63. 262 N.W.2d 612, 622 (Iowa 1978).

64. *Id.* at 614.

65. *Id.* at 614-15.

66. *Id.* at 615.

trial resulted in a judgment against the city. Only compensatory damages were awarded, however, because the court held as a matter of law that punitive damages were not recoverable from a municipality. The city appealed to the Supreme Court of Iowa, claiming that the judge had improperly instructed the jury on the issue of false arrest.[67] Young cross-appealed requesting punitive damages in addition to the compensatory award.[68] The Supreme Court of Iowa reversed the trial court on both issues, holding that a warrantless arrest for a misdemeanor is proper when a police officer has probable cause to believe it is occurring in his presence,[69] and that a punitive damage award should have been permitted against the city.[70] An earlier case, *Bennett v. City of Marion*,[71] which had denied punitive damages against municipalities, was distinguished because it had been decided during a time when punitive damages were not favored against any defendant and before the trend toward abrogation of common-law municipal immunity.[72]

The *Young* court justified its decision on grounds of social policy as well as legislative intent. It recognized that the majority of states fear that punitive damage awards against a municipality would overburden a city's treasury,[73] and that the deterrence and punishment functions of punitive damages are not served when awarded against a municipality.[74] The *Young* court argued against these and other policy considerations and upheld the award of punitive damages against Des Moines on statutory grounds. The Iowa statute[75] abrogating the immunity municipalities enjoyed at common law is silent with respect to punitive damages, but the court in *Young* interpreted it as permitting punitive damages awards against municipalities.[76] Although the court's allowance of such awards can be justified on the basis of legislative intent, its discussion of the policy reasons in support of the decision comes dangerously close to concluding that, even without legislative sanction, the better rule would be to allow punitive damages against a municipal defendant. It is necessary, therefore, to examine both the policy rationale and the legislative interpretation of the court in the *Young* case.

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67. *Id.* at 614.

68. *Id.*

69. *Id.* at 619.

70. *Id.* at 622.

71. 102 Iowa 425, 71 N.W. 360 (1897).

72. 262 N.W.2d at 220.

73. Smith v. District of Columbia, 336 A.2d 831 (D.C. 1975); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810 (Mo. 1968); Rannells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975).

74. 262 N.W.2d at 621.

75. "Except as otherwise provided in this Chapter, every municipality is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function." 41 IOWA CODE ANN. § 613A.2 (West Supp. 1979).

76. 262 N.W.2d at 222.

B. *Critique*

1. *Policy Considerations*

The court in *Young* discussed and rejected many of the arguments in support of the rule disallowing punitive damages against a municipality. It has been argued that, because the amount of a punitive damage award increases with the wealth of the defendant,[77] if evidence of a city's unlimited taxing power were introduced, the city could theoretically be burdened by an overwhelming award.[78] The court in *Young* did not consider such a theoretical possibility to be an obstacle to awards of punitive damages, but instead maintained that a municipality's ability to pay for punitive damages would be admissible as evidence and the jury would allocate an amount that was appropriate. This contention, however, fails to confront the issue of the enormous wealth potential of a municipality through its taxing power. Awards would necessarily be high if the municipality is to be adequately punished. Moreover, the amount that would punish the municipality may be too difficult to determine.[79] For example, if the claim is for wrongdoing of an employee whose job was related to a proprietary function of the municipality, such as negligence in the maintenance of a sewer, the wealth of the sewage plant alone could perhaps be considered in determining the amount of punitive damages to award. This would only be effective as punishment if the sewage plant then lost funds equal to the punitive damage award from its operating expenses. More likely, the city treasury will pay the award and all functions of the municipality would suffer equally, but only to a slight degree because the sewage plant's wealth alone was determinative of the award. If the wrongdoing arose from a governmental function such as false arrest by a police official, the same problem would arise. In both situations, if the entire municipality's wealth were considered, and punitive damages awarded on that basis, the department from which the wrongdoing arose would theoretically be indirectly reprimanded, not through loss of funds, but because the top officials will become so distressed by the award that they will instigate new procedures to avoid the wrongdoing. If, however, the entire wealth of the municipality is considered, the award against the municipality could be unjustly crippling to many innocent departments of the municipality.

It has been suggested by several commentators that punitive damages will be constrained by the general principle that a punitive award need bear a reasonable relationship to the compensatory damages awarded.[80] This reasonable ratio rate, however, is not followed in all jurisdictions,[81] nor in

77. *See* text accompanying note 10 *supra.*

78. *See* cases cited in note 73 *supra.*

79. City of Gary v. Falcone, 348 N.E.2d 41 (Ind. Ct. App. 1976).

80. *See* text accompanying notes 16-18 *supra.*

81. *Id.*

Iowa,[82] and those jurisdictions that claim they do recognize it frequently permit extremely disproportionate awards.[83] Cases calling for punitive damages are generally those with outrageous wrongdoings that arouse the sympathies of the jury,[84] and therefore punitive awards are large. Furthermore, if the reasonable ratio rule is followed, the amount of damages awarded would not be controlled by the amount that would adequately punish the defendant and, thus, the punitive function of the award would remain unsatisfied.[85]

The court in *Young* also considered the contention that the most commonly cited theories supporting punitive damages, that is, punishment and deterrence, are not fulfilled when punitive damages are permitted against a municipality.[86] The majority of states that disallow punitive damages against municipalities maintain that the taxpayers are innocent of direct wrongdoing, yet would bear the burden of satisfying the punitive damage award.[87] Although the wrongdoer himself should be responsible for a punitive award, it would be rare that a municipal employee would have sufficient financial resources to bear this burden.[88] Consequently, the innocent taxpayers would ultimately pay for the awards. Furthermore, the *Young* court failed to confront the strongest argument in support of the majority viewpoint. The purpose of punishing an offender is to benefit the members of society; however, the taxpayers are paying for this benefit themselves.[89] This ironical consequence does not occur with any other defendant.

A similar argument is made concerning the deterrent function of punitive damages. If a municipality is liable vicariously, there is no wrongdoing to be deterred. The wrongdoing employee will not be deterred either, because he will probably not be able to pay the award.[90] Moreover, it is assumed that municipal officials will punish their errant employees even in the absence of a punitive damage award.[91] The wrongdoing itself,

82. Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973).

83. *See* text accompanying notes 16-18 *supra*.

84. Belli, *supra* note 8, at 43.

85. Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Chappell v. City of Springfield, 423 S.W.2d 810 (Mo. 1968).

86. *See* 262 N.W.2d at 621.

87. Smith v. District of Columbia, 336 A.2d 831 (D.C. 1975); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); City of Gary v. Falcone, 348 N.E. 2d 41 (Ind. Ct. App. 1976); M'Gary v. President of Lafayette, 12 Rob. 674, 43 Am. Dec. 239 (La. 1846); Foss v. Maine Turnpike Auth., 309 A.2d 339 (Me. 1973); Town of Newton v. Wilson, 128 Miss. 726, 91 So. 419 (1922); Chappell v. City of Springfield, 423 S.W.2d 810 (Mo. 1968); Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952); Rannells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975); Nixon v. Oklahoma City, 555 P.2d 1283 (Okla. 1976).

88. Smith v. District of Columbia, 336 A.2d 831 (D.C. 1975); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); City of Gary v. Falcone, 348 N.E.2d 41 (Ind. Ct. App. 1976).

89. *See* cases cited in note 87 *supra*.

90. *See* cases cited in note 88 *supra*.

91. Smith v. District of Columbia, 336 A.2d 831 (D.C. 1975); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); City of Gary v. Falcone, 348 N.E.2d 41 (Ind. Ct. App. 1976); Chappell v. City of Springfield, 423 S.W.2d 810 (Mo. 1968).

as well as the compensatory damages, are considered an adequate spur.

The court in *Young*, dismissed these policy justifications in support of the majority viewpoint because similar arguments had been rejected with respect to private corporations.[92] Although private corporations are generally liable for punitive damages for the actions of their employees, this liability has caused debate for over one hundred years. Many jurisdictions permit punitive damage awards against a private corporation, even though there was no fault on the part of the corporation or its top level officials, provided that the offender was acting within the scope of his employment.[93] The Supreme Court of Iowa has adopted this viewpoint.[94] There has been growing acceptance, however, of the theory that before a private corporation can be held liable for punitive damages, the corporation or its high level officials must have authorized, ratified, or participated in the wrongdoing or hired an unfit employee.[95]

Most of the arguments that support disallowance of punitive damages against a municipality also apply when such damages are permitted vicariously against a private corporation; but even if punitive damages are allowed against a private corporation, there are additional reasons to disallow them against municipalities. Suits against municipalities, unlike those against private corporations, have not found the presence of authorization or ratification to be a prerequisite for punitive damages. The majority of states that forbid punitive damages against a municipality forbid them under all circumstances.[96] In *Young*, the court failed to discuss whether the municipality had ratified or authorized the policeman's conduct; presumably, therefore, a municipality in Iowa is to be liable under either circumstance.

Theoretically, if either high officials or the taxpayers themselves ratify or authorize the wrongdoing, or hire unfit employees, there is active fault that may deserve punitive damages. In *City of Lawton v. Johnston*,[97] which has subsequently been disapproved,[98] the court in dicta supported awards of punitive damages if the *taxpayers* acquiesced in the aggravated conduct. Another case,[99] although no longer of precedential value,[100]

92. 262 N.W.2d at 621.

93. Kelite Products, Inc. v. Binzel, 224 F.2d 131 (5th Cir. 1955); Western Coach Corp. v. Vaughn, 9 Ariz. 336, 452 P.2d 117 (1969); Miller v. Blanton, 213 Ark. 246, 210 S.W.2d 293 (1948); Alexander v. Alterman Transport Lines, Inc., 327 So. 2d 860 (Dist. Ct. App. Fla. 1976); Goddard v. Grand Trunk Ry., 57 Me. 202 (1869); Hairston v. Atl. Greyhound Corp., 220 N.C. 642, 18 S.E.2d 166 (1942); Stroud v. Denny's Restaurant, Inc., 271 Or. 430, 532 P.2d 790 (1975). *See also* Morris, *supra* note 16, at 1201.

94. Northrup v. Miles Homes, Inc., 204 N.W.2d 850 (Iowa 1973).

95. Lake Shore & Mich. So. Ry. Co. v. Prentice, 147 U.S. 101 (1893); Fort v. White, 530 F.2d 1113 (2d Cir. 1976) (applying Connecticut law); Parris v. Johnsbury Trucking Co., Inc., 395 F.2d 543 (2d Cir. 1968) (applying Vermont law); Emmke v. De Silva, 293 F. 17 (8th Cir. 1923); Security Aluminum Window Mfg. Corp. v. Lehman Assoc., Inc., 108 N.J. Super. 137, 260 A.2d 248 (1970).

96. *See* cases cited in note 2 *supra.*

97. 123 Okla. 145, 252 P. 393 (1926).

98. Nixon v. Oklahoma City, 555 P.2d 1283 (Okla. 1976).

99. St. John's Gas Co. v. City of San Juan, 1 P.R. Fed. 160 (1902).

100. *See* Cooperative de Seguros Multiples v. San Juan, 289 F. Supp. 858 (D.P.R. 1968)

illustrates what ratification by the taxpayers entails. The mayor had wrongfully taken control of a private gas company, and the court held the municipality liable for punitive damages because they received the benefit from the mayor's acts.[101]

Taxpayers as a whole, however, would rarely be guilty of *expressly* authorizing municipal employees to engage in aggravated conduct, and it is unjust to hold taxpayers liable for punitive damages for merely receiving a benefit from the wrongdoing. Passive acquiescence in conduct does not rise to the aggravated level meriting punitive damages. Moreover, it is often argued that taxpayers, as contrasted to stockholders,[102] can do little to control the acts of employees.[103] If a wrongdoing municipal employee is not an elected official, the taxpayers have no direct control over his conduct and no opportunity to replace him. If the employee is in an elected position, the taxpayers have an opportunity to vote him from office, but no additional control over his conduct. In reality, stockholders may have equally limited control over the selection and conduct of employees. They typically elect the Board of Directors, which is responsible indirectly for management of the corporation. This similarity alone, however, does not compel the conclusion that municipalities and private corporations be treated alike.

It can be argued that the taxpayers are indirectly responsible for the position each municipal employee occupies; either they directly elected him, or an official that they elected directly or indirectly selected him and therefore the taxpayers should be liable for each employee's misconduct. This may be an appropriate justification for allowing a plaintiff to be *compensated* by a municipality, but not for allowing punitive damages. A plaintiff who has been injured should not be prejudiced by losing a right to be compensated, but because punitive damages are not awarded as of right,[104] and are a windfall to the plaintiff[105] for the benefit of others, there is no prejudice to plaintiffs who fail to receive punitive damages from a municipal defendant. Therefore, because the taxpayers lack control over municipal employees, and because no injustice occurs by denying a plaintiff a punitive damage award, a municipality should not be burdened with punitive damages when the taxpayers have merely ratified a municipal employee's misconduct.

It is more difficult to support the disallowance of punitive damages when the top officials of a municipality, as opposed to the taxpayers, have authorized, ratified, or participated in the misconduct or hired an unfit employee. *Young* maintained that if municipalities are liable for punitive

(explaining that punitive damages are not permitted in Puerto Rico against any defendant, because civil law jurisdictions do not recognize the doctrine).

101. 1 P.R. Fed. at 163.

102. Rannells v. City of Cleveland, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975), *citing* Costich v. City of Rochester, 68 App. Div. 623, 73 N.Y.S. 835 (1902).

103. *Id.*; Nixon v. Oklahoma City, 555 P.2d 1283 (Okla. 1976).

104. *See* cases cited in note 12 *supra.*

105. *See* note 35 and accompanying text *supra.*

damages, officials, who have to answer to the public at election time, will be more careful in their selection of employees.[106] If there is no allegation of improper hiring, however, or other wrongdoing of municipal officials, it is unjust, as well as impractical, to impose such harsh burdens on the municipality. The officials are innocent, and there is no wrongdoing to deter.

If, however, an official is responsible for hiring an unfit employee, the pressure from his supervisors and the public may, as *Young* suggests, induce more careful hiring of employees. If the official is guilty of ratifying or authorizing the misconduct, an award of punitive damages against the municipality may encourage that department to develop more stringent standards of conduct. If the official at fault is not in an elected position, however, it is unjust to punish the taxpayers for conduct for which they are not responsible. Moreover, the taxpayers may have equally tenuous control over an *elected* official who is at fault for either hiring an unfit employee or ratifying or participating in the wrongdoing. By the time a judgment has been reached, the official's term in office may have expired. Therefore, the taxpayers are overwhelmed by a large award, and cannot show their dissatisfaction by replacing the responsible official. Admittedly, if the official does remain in office until the punitive damages are awarded, rejecting him at the polls would not only terminate the immediate problem but would deter those filling his position from similar misconduct. This is analogous to the situation of a private corporation. If the corporate official guilty of ratification, authorization, or negligent hiring is fired or reprimanded because of the punitive damage award, he and others will be deterred from wrongdoing in the future.

Even though, theoretically, there is at least one circumstance in which an award of punitive damages could deter the misconduct of municipal employees, there are important considerations that justify the majority viewpoint that disallows punitive damages against a municipality. Punitive damages in general are to benefit society by punishing wrongdoers and deterring them and others from participating in similar misconduct. In a private corporation, the shareholders, even if innocent of direct wrongdoing, must suffer the penalty of punitive damages in order to benefit the entire community. *When punitive damages are permitted against a municipality, however, the taxpayers who are to benefit from the punishment bear the cost of the award.* This wasted money could be better justified if the award were channeled into state or municipal treasuries to support the implementation of stricter employee selection standards, and if departmental regulations were implemented to help prevent future wrongdoing. Instead, the plaintiff, who has also received compensation for his actual injuries, reaps an unnecessary windfall at the cost of the taxpayer. This is true in all suits against a municipality, regardless of

106. 262 N.W.2d at 621-22.

whether there has been active fault by the top officials. Furthermore, punitive damages are not essential because the publicity of the wrongdoing, together with the *compensatory* damage award, serve to deter future wrongdoing. In addition, it is frequently maintained that one cannot be found vicariously guilty in a criminal suit,[107] because to penalize one who is not personally guilty is both unjust and serves no deterrent purpose.[108] Punitive damage awards against a municipality are similarly an unjust and useless penalty when the municipality is held vicariously liable in a civil action:

> The distinction between *respondeat superior* in tort law and its application to the criminal law is obvious. In tort law the doctrine is employed for the purpose of settling the incidence of loss upon the party who can best bear such loss. But the criminal law is supported by totally different concepts. We impose penal treatment upon those who injure or menace social interests, partly in order to reform, partly to prevent the continuation of the anti-social activity and partly to deter others. If a defendant has personally lived up to the social standards of the criminal law and has not menaced or injured anyone, why impose penal treatment?[109]

In view of the criticism directed at punitive damages when awarded vicariously or against a municipality, as well as against punitive damages in general, the majority rule should prevail; absent a statute authorizing punitive damages, there should be none awarded against a municipality.

2. *Statutory Interpretation*

Although the court in *Young* thoroughly discussed and rejected the policy reasons that have persuaded other courts to disallow punitive damage awards against municipalities, its holding was primarily based on an interpretation of the Iowa statute[110] that removed the common-law immunity of municipalities. Although the statute did not specifically refer to punitive damages, the court concluded that it "removes all common law tort immunity previously accorded municipalities . . . ."[111] The court stated further that "there is presently nothing which suggests the general assembly intended to prohibit assessment of punitive damages against governmental subdivisions."[112] The court also felt that its conclusion was buttressed by the State Tort Claims Act,[113] which preceded the statute in

107. Commonwealth v. Koczwara, 397 Pa. 575, 155 A.2d 825 (1959) (no vicarious criminal liability unless a statute permits it for purely regulatory interests that are noncriminal and do not relate to questions of wrongdoing or guilt). See particularly Judge Musmanno's dissenting opinion, *id.* at 588, 155 A.2d at 831. *But see* MODEL PENAL CODE § 2.07 (Proposed Official Draft 1962) *and* OHIO REV. CODE ANN. § 2901.23 (Page 1975) (imposing some organizational liability upon corporations, *but specifically excluding governmental entities*).

108. *See generally* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

109. Commonwealth v. Koczwara, 397 Pa. 575, 580, 155 A.2d 825, 827 n.1 (1959).

110. 41 IOWA CODE ANN. § 613A.2 (West Supp. 1979); *see* note 75 *supra* for the relevant text of the statute.

111. 262 N.W.2d at 622.

112. *Id.*

113. "The State shall be liable in respect to such claims to the same claimants, in the same

question and expressly precluded punitive damages against the state. The court maintained that the "failure to include a like immunity for municipal corporations can scarcely be attributed to inadvertence or oversight"[114] and that the legislature must have intended to permit punitive damages against a municipality.

This inconsistency between the statutes abrogating state and municipal immunity, however, is not as indicative of legislative intent as the court suggested. The Federal Tort Claims Act,[115] which specifically proscribes punitive damages, was used as a model by the Iowa legislature in enacting the State Tort Claims Act.[116] It could be argued that the municipality statute should be interpreted to preclude punitive damages because it was patterned after both the state and the federal act, which preclude such damages, and that the legislature would have expressly included punitive damages if that different result had been desired. The fact that the later statute referring to municipal liability is silent on the issue of punitive damages is no more suggestive that the legislature specifically intended to allow them than it is an indication that they intended to preclude them. Moreover, it is difficult to defend a justification that would encourage a legislature to permit punitive damages against a municipality, but not against a state. The court in *Young* seemed to be persuaded by the fact that it could find no policy reason why municipalities and private corporations should be treated differently with respect to liability for punitive damages.[117] An even stronger argument, however, can be made that there is no justification for deciding that local governments are liable for punitive damages while the state government is not.

As stated above,[118] the court in *Young* reasoned that, without express provision to the contrary, the Iowa statute removing common-law tort immunity must be read as also abolishing immunity from punitive damages. The general rule, however, has been to interpret strictly statutes that would possibly permit punitive damages against a municipality.[119] Therefore, if a statute allowed treble damages against any defendant, treble damages against a municipality have been precluded.[120] Statutes such as the one interpreted in the *Young* case, which permit a tort action

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manner, and to the same extent as a private individual under like circumstances, except that *the state shall not be liable* for interest prior to judgment or *for punitive damages.*" 3A IOWA CODE ANN § 25A.4 (West 1978) (emphasis added).

114. 262 N.W.2d at 622.

115. Federal Tort Claims Act, 28 U.S.C. § 2674 (1976).

116. 3A IOWA CODE ANN. § 25A.4 (West 1978). *See* note 113 *supra* for the relevant text of the statute.

117. 262 N.W.2d at 622.

118. *See* text accompanying note 112 *supra.*

119. *See* cases cited in notes 120-21 *infra.*

120. Desforge v. City of West St. Paul, 231 Minn. 205, 42 N.W.2d 633 (1950); Hunt v. City of Boonville, 65 Mo. 620, 27 Am. Rep. 299 (1877).

against a municipality but are silent with respect to punitive damages, have been interpreted as not condoning them against a municipality.[121]

There are two cases that recently avoided this general rule of strict interpretation and permitted punitive damages against a municipality, but neither was discussed in *Young* on the issue of statutory interpretation. In Pennsylvania, a federal district court held, in a case of first impression, that a Pennsylvania court would allow punitive damages against the municipal defendant.[122] The court contended that a Philadelphia ordinance,[123] which permitted suits against the city "*in accordance with the same rules of law* as applied by the Courts of this Commonwealth *against any other party defendant,*"[124] was to be interpreted broadly to include punitive damage awards. There was no discussion of the policy arguments against such awards. No other Pennsylvania case has been found that further considers this issue.

New York's position on the issue of punitive damages is rather unclear. In *Costich v. City of Rochester*,[125] the court made an emphatic argument against all punitive damage awards to municipalities. That case, however, was decided before the enactment of the State Court of Claims Act,[126] which was interpreted to extend liability for damages to municipalities as well as the state.[127] Fifty-six years after *Costich*, the same court that had decided *Costich* stated, in *Raplee v. City of Corning*,[128] that whether punitive damages were allowed against municipalities was "not free from doubt."[129] Then, in *Hayes v. State*,[130] the New York Court of Claims, holding that punitive damage awards were permitted against the state, stated in dicta that such awards against municipalities could also be sustained. The court of claims maintained that the State Court of Claims Act,[131] which permits damages against the state as if it were an individual or corporation, was evidence of the legislature's goal of allowing punitive

121. Burr v. Town of Plymouth, 48 Conn. 460 (1881); Woodman v. Nottingham, 49 N.H. 387 (1870); Brown v. Village of Deming, 56 N.M. 302, 243 P.2d 609 (1952).

122. Hennigan v. Atlantic Ref. Co., 282 F. Supp. 667 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969).

123. PHILADELPHIA, PA. CODE ch. 21-700 (1962).

124. *Id., quoted in* Hennigan v. Atlantic Ref. Co., 282 F. Supp. 667, 683 (1967) (emphasis added by the *Hennigan* court).

125. 68 App. Div. 623, 73 N.Y.S. 835 (1902).

126. "The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations . . . ." N.Y. JUD. LAW § 8 (McKinney 1963).

127. *See* discussion in Hayes v. State, 80 Misc. 2d 498, 363 N.Y.S.2d 986 (Ct. Cl. 1975), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S.2d 647 (1975).

128. 6 App. Div. 2d 230, 176 N.Y.S.2d 162 (Sup. Ct. App. Div. 1958).

129. *Id.* at 232, 176 N.Y.S.2d at 165.

130. 80 Misc. 2d 498, 363 N.Y.S.2d 986 (Ct. Cl. 1975), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S.2d 647 (1975).

131. N.Y. JUD. LAW § 8 (McKinney 1963).

damages against the state or a municipality. Therefore, the court contended that considerations of public policy were not necessary. The most recent New York case[132] brought against a municipality avoided the issue by refusing a punitive damage award on other grounds.

Both Pennsylvania and New York indicate that there may be a trend toward relaxing the disallowance of punitive damages, especially when the common-law municipal tort immunity has been statutorily, rather than judicially, abrogated. The relevant laws in Pennsylvania and New York, however, both explicitly require that a municipality's liability be determined in the same manner used for "any other party defendant"[133] or "individual or corporation."[134] This language is to be contrasted with that of the Iowa statute, which merely makes a municipality "subject to liability for its torts . . . ."[135] Surely it is more reasonable to interpret the former statutory schemes as contemplating punitive damage awards against municipalities than it is the latter, especially in light of the strict construction to be given these statutes.[136] In any event, a more definite expression of the states' policies is required before either New York or Pennsylvania can be cited as strong authority allowing punitive damages against a municipality.

Although the court in *Young* relied partially upon legislative intent to uphold the award of punitive damages against Des Moines, the court's analysis is vulnerable. The court reasoned that the legislature consciously omitted any reference to punitive damages so that they could be awarded against a municipality and not the state. Yet what policy justification would encourage a legislature to permit punitive damages against a municipality, but not against the state? If the legislature did intend this inconsistent result, it should have been forced to state so expressly in the statute. The court should have been more reluctant to imply legislative acquiescence to punitive damages because of the general rule that statutes which possibly allow punitive damages must be interpreted strictly and because, in arriving at its result, the court was forced to overrule a case[137] that, despite the fact that it was decided in 1897, had been used by many courts to justify the disallowance of punitive damage awards against a municipality.[138]

There are recent decisions interpreting civil liability under 42 U.S.C. § 1983[139] that may thwart the goals supporting disallowance of punitive

132. Kieninger v. City of New York, 53 App. Div. 2d 602, 384 N.Y.S.2d 11 (1976).

133. N.Y. JUD. LAW § 8 (McKinney 1963).

134. PHILADELPHIA, PA. CODE ch. 21-700 (1962).

135. 41 IOWA CODE ANN. § 613A.2 (West Supp. 1979).

136. *See* text accompanying notes 123-25 *supra*.

137. Bennett v. City of Marion, 102 Iowa 425, 71 N.W. 360 (1897).

138. *See, e.g.*, Mayor of Americus v. Ansley, 14 Ga. App. 707, 82 S.E. 159 (1914); Desforge v. City of St. Paul, 231 Minn. 205, 42 N.W.2d 633 (1950).

139.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

damages against a municipality. In *Monell v. Department of Social Services of the City of New York*,[140] the United States Supreme Court, expressly overruling *Monroe v. Pape*,[141] held that municipalities are "persons" within section 1983 and therefore are not immune from a section 1983 suit. Although the Supreme Court has not specifically ruled on the issue, several circuits have permitted punitive damage awards against defendants in section 1983 actions.[142] The Court has indicated, however, in a footnote in *Carey v. Piphus*,[143] that it may allow punitive damages when the requisite malice is present. Therefore, potential tort claims suits in the state courts could be brought as section 1983 actions so that punitive damages could be recovered. The Court in *Monell*, however, limited the situations under which a municipality could be sued in section 1983 actions:

> We conclude, therefore, that a local government may not be sued under § 1983 for injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983 . . . . [W]e have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be.[144]

If this language is interpreted broadly, so that many plaintiffs are able to avoid the disallowance of punitive damages in state tort suits by utilizing section 1983, the majority viewpoint must be reconsidered to determine if the negative aspects of such "cause of action" shopping outweigh the policy considerations supporting disallowances of punitive damages.

III. CONCLUSION

Neither the policy nor the legislative intent rationales advanced by the *Young* Court are convincing and, therefore, the court's holding should not be utilized by other jurisdictions to permit awards of punitive damages against a municipality. The court, although commendably attempting to "deter unfounded and oppressive peace officer conduct under the guise of official action,"[145] ignored the principal justification for disallowance of punitive damages against municipalities. The taxpayers, who are to receive the benefits from the infliction of punitive damages awards upon

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> State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

140. 436 U.S. 658 (1978).

141. 365 U.S. 167 (1961).

142. *See* cases cited in Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978).

143. *Id.*

144. 436 U.S. at 694-95.

145. 262 N.W.2d at 622.

wrongdoers, are the same group who are paying for the awards. Furthermore, because of the widespread reluctance of courts to allow punitive damages against municipalities in the absence of express statutory authority, the statues abrogating common-law immunity should be interpreted strictly against punitive damages. Instead, the court in *Young* created a paradox whereby punitive damages are not permitted against the state and are permitted against the municipality. There are sound policy reasons to continue the widespread protection of municipalities from punitive damage awards that must be weighed in the absence of a relevant statute, as well as in interpretation of statutes that would possibly permit them.

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